United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1904.

No. 1459.

THE COLUMBIAN CORRESPONDENCE COLLEGE, A REGULARLY INCORPORATED INSTITUTION OF LEARNING, ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE STATUTES OF THE STATE OF WEST VIRGINIA, APPELLANT,

vs.

HENRY C. PAYNE, POSTMASTER-GENERAL OF THE UNITED STATES, AND EDWIN C. MADDEN, THIRD ASSISTANT POSTMASTER-GENERAL.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 29, 1904.

In the Court of Appeals of the District of Columbia.

THE COLUMBIAN CORRESPONDENCE COLLEGE, &c.,
vs.
HENRY C. PAYNE, Postmaster-General of the United States, *et al.* } No. 1459.

a Supreme Court of the District of Columbia.

THE COLUMBIAN CORRESPONDENCE COLLEGE, a Regularly Incorporated Institution of Learning, Organized and Existing under and by Virtue of the Statutes of the State of West Virginia, Complainant,
vs.
HENRY C. PAYNE, Postmaster-General of the United States, and Edwin C. Madden, Third Assistant Postmaster General, Defendants. } No. 23533. In Equity.

UNITED STATES OF AMERICA, *District of Columbia,* } *ss:*

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to wit:—

1 *Bill in Equity.*

Filed September 26, 1902.

In the Supreme Court of the District of Columbia.

THE COLUMBIAN CORRESPONDENCE COLLEGE, a Regularly Incorporated Institution of Learning, Organized and Existing under and by Virtue of the Statutes of the State of West Virginia, Plaintiff,
vs.
HENRY C. PAYNE, Postmaster-General of the United States, and Edwin C. Madden, Third Assistant Postmaster-General, Defendants. } Equity. No. 23533.

To the supreme court of the District of Columbia holding an equity court, the plaintiff states as follows:

1. It is a citizen of the State of West Virginia, a corporation duly

organized and existing under and by virtue of the laws of the State of West Virginia, as a "regularly incorporated institution of learning," see "Exhibit A," and brings this suit in its own right.

2. The defendants are citizens of the United States and residents of the District of Columbia, and the said Henry C. Payne is sued in this action in his official capacity as Postmaster-General of the United States, and the said defendant, Edwin C. Madden is sued in his official capacity and as Third Assistant Postmaster-General.

3. That on the twenty-fifth day of July, 1899, the plaintiff was legally organized as "a regularly incorporated institution of
2 learning;" a corporation for carrying on the business of an educational institution, giving instruction in the class room, by mail or otherwise, granting such academic or honorary degrees as are usually granted by colleges and universities, publishing, copyrighting, purchasing, leasing, loaning or hiring books to be used as text books for courses taught by the said college, publishing periodicals for the benefit of the said college, purchasing, owning, or leasing copyrights, stereotype plates or books in process of completion of the class above enumerated and disposing of the same and all rights acquired by such purchases or leases; employing agents, firms or corporations to sell such books or to represent the said college in any other capacity, buying, selling, holding, leasing, and renting lands, tenements and hereditaments, erecting buildings, etc., for the purpose of said college, and doing other acts necessary for carrying out the objects above stated, with all rights under the laws of West Virginia; keeping its principal office or place of business at 223 and 225 Pennsylvania avenue, southeast, in Washington in the District of Columbia; and having a capital of sixty thousand dollars ($60,000) divided into shares of ten dollars ($10) each, fully paid in and with the privilege of increasing the capital stock to the sum of one hundred thousand dollars ($100,000). The president of said corporation is Daniel A. Edwards, James A. Edwards, manager, and Thomas Edwards, Jr., treasurer, all residents of the city of Washington, District of Columbia. The plaintiff further showeth that it is now conducting under said charter an incorporated institution of learning known as the "Columbian Correspondence College" at
3 the numbers above stated in said city of Washington; that in and about the conduct of said school several thousand students are enrolled and are members of various classes in the college of the plaintiff and of the departments of law, normal, civil service, bookkeeping and stenography, and literature and journalism. The dean of the college is Charles A. Ray, LL. D. (late justice of the supreme court of Indiana). The instructors are the dean, Cecil French, V. S. (McGill university), D. V. S. (Royal Veterinary high school, Munich, Germany), William T. Rollins, LL. M. (National university), Thomas Edwards, Jr., LL. B. (University of Michigan), Jerome Z. Bayliss, B. S. (Case School of Applied Science), John A. Graham, M. Accts. (Eastman college), M. E. Pancoast,

B. L. (Swarthmore college), Andrew Fuller Craven, LL. B. (Chicago university), A. B. (Harvard university), Ph. D. (Johns Hopkins university), H. C. Cooke, expert stenographer, M. J. Powell, (graduate Norfolk college), Frederick F. Schrader, (congressional reporter, author and dramatist), Ellen A. Vinton, B. S., M. A. (Wellesley college), Alice Weldon Wasserbach, author and critic, T. L. Mead, (Western Reserve university), and G. Ross, A. B. (Columbian university). The method of instruction pursued by the plaintiff through its officers and instructors is the same as that provided by the correspondence-study department of the University of Chicago, of which Professor William Rainey Harper, president of the university, Professor Edmund Janes James, and Professor Hervey Foster Mallory, constitute the officers of administration, the faculty being composed of Professor William Railey Harper, Ph. D., D. D. LL. D., and other professors of the university. The international correspondence
4 school located at Scranton, Pennsylvania, is also engaged in the same method of teaching. There are many other schools of good repute through the various States in this country giving instruction, and the plaintiff states it as a fact that, according to the best of his information and belief, more students are studying by the correspondence method to-day than there are in all the other colleges and universities combined and it is in recognition of this fact, that the University of Chicago, under the supervision of President Harper, one of our leading educators, has now a correspondence division which gives two hundred and thirty-eight different courses. The international correspondence school of Scranton, Pennsylvania, claims to, and probably does, give instruction in the industrial arts and sciences to over 75,000 students each year, thus showing that instruction by correspondence is well established and in its application very valuable in institutions of learning.

4. And the plaintiff further showeth; that, by the rulings of the Postoffice Department, under the act of March 3, 1879, section 14, 20 Statutes 359, (defining second-class matter admissible to the mails at the pound rate), periodical publications issued from a known place of publication, at stated intervals, and as frequently as four times a year, by a regularly incorporated institution of learning, were not admissible to the mails as second-class matter unless having a legitimate list of subscribers. That on the fourteenth day of October, 1893, a bill was introduced in the House of Representatives in which it was among other things provided "that from and after the passage thereof all periodical publications issued from a known place
5 of publication at stated intervals and as frequently as four times a year by regularly incorporated institution of learning shall be admitted to the mails as second-class matter, and the postage thereon shall be the same as on other second-class matter and no more, *Provided*, further, That such matter shall be originated and published to further the objects and purposes of such institution of learning, and shall be formed of printed paper sheets without

board, cloth, leather or other substantial binding, such as distinguish books for preservation from periodical publications." Thereupon the Committee on Postoffices and Postroads, through its chairman, Honorable John S. Henderson, transmitted a copy of this bill to the Honorable W. S. Bissell, Postmaster-General, requesting such "information and suggestions" as the subject might warrant, as to the effect of the passage of the pending bill. In answer thereto Honorable W. S. Bissell, Postmaster-General, addressed a letter to the Honorable John S. Henderson, chairman of the Committee on Postoffices and Postroads, House of Representatives, Washington, D. C., as follows:

"OFFICE OF THE POSTMASTER-GENERAL,
WASHINGTON, D. C., *October* 31, 1893.

SIR: I have the honor to acknowledge receipt of your communication of the 16th inst., transmitting copy of bill H. R. 4003" to admit to the mails as second-class matter, periodical publications issued by or under the auspices of regularly incorporated benevolent societies and orders and institutions of learning," and asking me for "such information and suggestions" as the subject
6 may warrant. In reply I regret to say that this measure is one that does not commend itself to my favor. The reasons upon which my objections are founded are these:

* * * * * * *

Second. The institutions of learning in this country amount to thousands. Looking casually over the last report of the United States Bureau of Education, I find that the colleges and universities, the schools of theology, medicine, law and science; the technological, normal, commercial and business colleges, and other classes of colleges—not, of course, including the public schools—aggregate over 3,000. To these should be added scientific and historical societies; medical and law societies; agricultural, art, and scientific societies; and other societies the object of which is to advance learning in all its great departments. When it is considered that any publication issued four times a year by these institutions and societies may, under the terms of the bill, go through the mails at the rate of a cent a pound, the burden that would be imposed eventually upon the postal service would be enormous.

Third. Among the present safeguards provided by law against an inundation of the mails by publications claiming second-class privileges, are that they shall not be issued to advance the other interests of the publishers; that they shall have a list of subscribers; that they shall not be intended primarily for advertising purposes, or for gratuitous distribution; and these conditions have been found by experience to be in the interest of the Government as well as of legitimate publications. In the case of publications covered by
7 the terms of the bill under consideration, all these barriers are removed, and the strange provision is substituted that the

periodicals shall be originated and published to further the objects and purposes of the publishers.

Thus catalogues, prospectuses, reports, calls of meetings, everything, in a word, that is of advertising character or calculated to help the society, or order, or institution—could come in. It needs but a moment's reflection to see that, under such a provision as this, the amount of mere advertising matters—such as now pays when sent by mail 8 cents a pound—that would be mailed at a cent a pound, would be almost incalculable. In the great cities this mass of matter would in many cases be so great that the letter-carriers could not handle it without a great increase of force.

Altogether the bill is so objectionable that I trust your committee will not hesitate to report it adversely.

Yours, very respectfully, W. S. BISSELL,
Postmaster-General."

This letter of the Postmaster-General's was submitted to the House of Representatives by the Committee on the Postoffices and Post-roads, pending the debate on the passage of the bill, now constituting the present existing law, and after earnest and full debate, it was, without a division, concurred in as a declaratory statement of the then existing law, by an amendment to the general appropriation for the Postoffice Department, on April 6, 1894. Pending the passage of the bill in the House, however, the point of order was made that the amendment offered did in fact and in effect
8 change an existing law, and did not reduce expenses, and therefore violated the rule of the House that such amendments should not be permitted to appropriation bills. It was contended by those favoring the passage of the amendment that the bill was simply declaratory in its terms of the existing statute, and that it corrected an error into which the department and the Postmaster-General had fallen in excluding, among others, publications by incorporated institutions of learning, and at the conclusion of a lengthy debate a ruling was made as follows by the chairman;

"The chair has given to the point of order raised by the gentleman from North Carolina (Mr. Henderson) to the amendment offered by the gentleman from Illinois (Mr. Springer) the most careful consideration. The chair has listened with a great deal of interest to every statement that has been made upon the floor by gentlemen who have addressed themselves to the point of order. In the mind of the chair there is but a single question to be determined in passing upon this point of order, and that is as to whether the amendment offered by the gentleman from Illinois does in fact and in effect change an existing law, or whether it simply declares what the existing law is; in other words, whether it makes a change of existing law or merely a change of the interpretation and construction of that law by the Postoffice Department.

The Postmaster-General, as the executive officer of that department, having the responsibility of the execution of all laws relating

to the department has, in the judgment of the chair, the same right of interpretation and construction of an existing statute that a court of competent jurisdiction has in passing upon a law, and that
9 construction or interpretation becomes a part of the law until the law is repealed, modified, changed, or declared to be otherwise, by the one power that has the right to overrule a construction or interpretation made by an executive department, the Congress of the United States. The House having jurisdiction of this appropriation bill, and this amendment being, in the judgment of the chair, germane to the bill, it seeks, in the opinion of the chair, to declare what the existing statute is. *It is simply declaratory in its terms, and it differs, of course, from the construction and interpretation placed upon the statute by the Postmaster-General.* Holding this view, the chair overrules the point of order, and will submit the amendment upon its merits to the committee. The clerk will report the modified amendment."

The bill having subsequently passed the Senate and received the approval of the President. became a law on July 16, 1894, and forms now section 429 of the Postal Laws and Regulations, 1902. Upon the passage of this act the previous ruling by the Postmaster-General was reversed and the publications therein described were immediately, in compliance with the statute admitted to the mails as second-class matter, and such admission was continued during successive postmasters including Postmaster-General Charles Emory Smith, until and during the early part of the year 1901; the present Third Assistant Postmaster-General, defendant to this bill; and having immediate control of the admission of periodicals to the second-class rates acquiescing as had all former Postmaster-Generals succeeding Postmaster-General Bissell up to the date last mentioned, in the contemporaneous construction placed upon the then existing law by the Congress of the United States in the passage of
10 the declaratory act. The institutions publishing, and the publications, were of like legal character with the plaintiff and its publication.

5. The plaintiff further showeth that relying upon the continued enforcement by the executive officers of the Postoffice Department of the contemporary construction placed upon the declaratory legislation of Congress, it prepared itself in July, 1899, at large expense, to enter upon the publication of a periodical entitled "The Student at Home," a semi-monthly publication within the description of the act of July 16, 1894, and complying with all the requirements of the Postoffice Department presented the publication to the proper officers for examination and admission to the mails at the rate fixed by law for second-class matter, and the same was duly admitted to the mail as such on the 31st day of July, 1899, by Postmaster-General Charles Emory Smith acting through Third Assistant Postma-ter-General Edwin C. Madden; and on the 18th day of July, 1900, the publication having changed from a semi-monthly to a monthly, it was again submitted for admission under the said act

of July 16, 1894, as second-class matter to the United States mails, and by the said Postmaster-General, Charles Emory Smith, the immediate predecessor of the present Postmaster-General, and the said Third Assistant Postmaster-General, Edwin C. Madden, admitted as second-class matter mailable at the pound rate.

6. And thereupon the plaintiff complains and says that though this publication "The Student at Home" — was originated and published by, and to further the objects and purposes of the Co-
11 lumbian Correspondence College, "a regularly incorporated institution of learning" had been determined by Postmaster-General Bissell—holding said office at the date of the passage of said act of July 16, 1894, over his protest—to be entitled to the second-class rates of postage, in accordance with his official construction, placed thereon in answer to the official request of the chairman of the Committee of Postoffices and Postroads, and though — every succeeding Postmaster and Third Assistant Postmaster, including the said Postmaster-General Smith, and Third Assistant Postmaster-General Madden, the said publication had been admitted to the mails under the two last named officers as second-class matter, and upon change of publication from a semi-monthly to a monthly, had been again admitted on July 18, 1900, yet on the 20th day of February, 1901, the following letter was received:

"OFFICE OF THE POSTMASTER,
WASHINGTON, D. C., *February* 20, 1901.

Daniel A. Edwards, pres't of the Columbian Correspondence College,
223 Pa. Ave. S. E., Washington, D. C.

SIR: The Third Assistant Postmaster-General instructs me to say that you will be allowed 30 days to show why you should not be denied the privilege of mailing your publication, the Student at Home, at the second-class rate of postage. See circular V—classification division—herewith enclosed.

Respectfully yours,

JOHN A. MERRITT, *Postmaster.*"

12 Cir. V—Classification division.

POST OFFICE DEPARTMENT,
WASHINGTON, D. C., *Feb.* 8, 1901.

In considering applications for the entry of publications under the act of July 16, 1894, postmasters will be guided by the words of the law and extracts from opinions of the assistant attorney general for this department published below:

* * * * * * *

Extract.

WASHINGTON, D. C., *April* 4, 1900.

* * * * * * *

"I have the honor to acknowledge the receipt of your communication of the 29th ultimo, requesting my opinion as to the meaning of the terms 'a regularly incorporated institution of learning' as contained in the act of July 16, 1894, relating to the admission to the mails as second-class matter of publications issued by benevolent or fraternal societies, institutions of learning, etc.

The case you present is that of the Gainesville Business College Company, of Gainesville, Texas, which makes application for the admission to the second-class rates, under the provisions of the act of July 16, 1894, of a periodical publication issued by said company.

You state that there are two classes of institutions applying for the privileges of this act; first, those of a public character incorporated under the name of the institution itself; and, second, those of a private character, incorporated by a stock company for purpose of gain.

13 In my judgment, the aim of the act of July 16, 1894, is to promote the interests of institutions of learning, organized for the benefit of the public, and not for any company or person maintaining and conducting a school, college or place of instruction for the personal benefit of the owner or stockholders.

'The Gainesville Business College Company' is incorporated under the laws of the State of Texas for the purpose of giving instructions, and such business is conducted for the benefit of the stockholders of the company. This company is not, in my judgment, a 'regularly incorporated institution of learning' within the meaning of the act of July 16, 1894, and, therefore, a publication issued by it is not admissible to the mails as second-class matter under the act.

JAS. N. TYNER,
Assistant Attorney General for the Post Office Department."

* * * * * * *

"JANUARY 24, 1901.

"I have before me your letters dated November 30, 1900 and December 7, 1900, with which you submitted a number of specimen periodicals, and ask 'to have a settlement of the following questions' viz:

First. The right of a publisher, under the 'educational' act to insert any advertising not pertaining strictly and immediately to the propagation of learning in its technical sense, as inculcating a knowledge of those branches of education which cultivate and enlarge the mind, as distinct from the sale of school furniture or any other article?"

* * * * * * *

14 "Under this law, to entitle a paper to be sent through the mails at second-class rates, among other things, the matter contained therein 'shall be originated and published to further the objects and purposes of such society, order, trades union, or institution of learning.' In reply, therefore, to your inquiry designated 'first,' I have to state that in my opinion a paper containing advertisements in the interest of other persons or concerns than the society, order, trades union, or institution of learning which such paper represents, is not entitled to the privileges of the law quoted. My opinion is strengthened by the fact that the act of Congress (March 3, 1879, 1 Supp. R. S. 246) which authorizes you to accept at second-class rates certain periodical publications having a 'legitimate list of subscribers,' expressly states:

'That nothing herein contained shall be so construed as to prohibit the insertion in periodicals of advertisements attached permanently to the same.'

This proviso applies only to the act in which it was incorporated, and as Congress has not seen fit to insert a similar provision in the act of July 16, 1894, we cannot place it there.

JAS. N. TYNER,
Assistant Attorney General for the Post Office Department.
EDWIN C. MADDEN,
Third Ass't P. M. Gen'l."

15 And the plaintiff further showeth that upon a hearing being had within the said thirty days, it was admitted by the Third Assistant Postmaster-General that there had been no change in the publication, but that the Postoffice Department had determined to place a new construction upon the act of July 16, 1894, and construe the words "a regularly incorporated institution of learning" as though not intended to include institutions having a stock basis. It was stated that this was the sole objection to the continued admission of the publication, and that this cause had existed known to the department, on the admission of the paper, as the certificate of incorporation had been exhibited to the department for inspection. After discussion the decision in the matter was postponed, subject to future consideration, the admission theretofore granted continuing in force, and the publication, the "Student at Home" being regularly accepted and mailed at second-class rates of postage. Some sixteen months thereafter, the following communications were received by the plaintiff, to wit:

"OFFICE OF THE POSTMASTER,
WASHINGTON, D. C., *June* 19, 1902.

Columbian Correspondence College, 223 Pa. Ave. S. E., Washington, D. C.

SIR: I am directed by the Third Assistant Postmaster General to notify you that you will be given a hearing July 2, 1902, at 10 a. m.,

at his office, to show why your publication, the Student at Home, should not be denied transmission in the mails as second class matter, on the ground that it is not issued by a regularly incorporated institution of learning within the meaning of the act of Con-
16 gress of July 16, 1894, under the provisions of which the publication has been entered in that class of mail matter. In addition to any oral statement that you may choose to make at the hearing referred to, you must submit the case in writing.

Respectfully yours,

JOHN A. MERRITT, *Postmaster.*"

"OFFICE OF THE THIRD ASS'T P. M. GEN'L,
WASHINGTON, D. C., *June* 30, 1902.

Mr. Charles A. Ray, dean Columbian Correspondence College, 225 Pennsylvania avenue S. E., Washington, D. C.

SIR: In compliance with the request made in your letter of the 27th instant, I have to inform you that the time set for the hearing to show cause why the "Student at Home" should not be denied further transmission in the mails as second class matter, under the act of July 16, 1894, has been changed from July 2, 1902, at 10 a. m., to July 9, 1902, at the same hour.

Respectfully yours, EDWIN C. MADDEN.
Third Assistant Postmaster General."

Complying with the notice, the plaintiff appeared at the time fixed in the notice, before the Third Assistant Postmaster General, and submitted its charter for inspection, and copies of the publication referred to in the letter from the said official, and the following affidavit by the president of the Columbian Correspondence College.

17 *Affidavit of President Columbian Correspondence College.*

In matter of admission of "The Student at Home" as second class matter.

CITY OF WASHINGTON, } *U. S.*
District of Columbia, }

Daniel A. Edwards, LL. M., president of the "Columbian Correspondence College," located in the said city of Washington and District of Columbia, being duly sworn, on his oath says: That on the application by said college for admission to the mails by the Post-office Department of "The Student at Home," (a newspaper regularly issued monthly by said college) as "second-class" matter, the charter of said corporation regularly incorporating it as "an institution of learning," was duly submitted to the postmaster of the city of Washington, upon an application in conformity to the requirement

of the Post-office Department in such cases made and provided, and thereupon the said post-master duly accepted said publication and entered the same for admission to the mails as second class matter. The newspaper so issued from its known office of publication has now reached its fourth volume, and the number for June, as is our almost invariable custom, has been prepared for the mail, addressed only to such persons as have made written application to the corporation for its catalogues and for information regarding the scope and work of the college; or to such persons as having made such formal application have not, on receipt of the first number of the paper mailed to them, enrolled themselves as students, such subsequent issue being sent to convey to them
18 additional information in accordance with the "objects and purposes" for which the matter therein contained "is originated and published." This purpose is, "to further the objects and purposes of such institution of learning." The paper, as I believe, in all respects conforms to the "act of July 16" 1894, and to the ruling of Postmaster-General Bissell in his official communication of October 21, 1893, to Hon. John S. Henderson, chairman Committee on the Post-office, and Post-roads, House of Representatives, in answer to his letter asking the Postmaster General "for such information and suggestions," as to the effect of the passage of such an amendment as is contained in the said act. This act was, after full discussion and consideration, in the Congress, of the letter and construction of the proposed laws by the Postmaster General, duly passed, authorizing the admission of such publications as described therein; or as the Postmaster General expresses the result of the amendment, "all these barriers are removed and the strange provision is substituted that the periodicals shall be 'originated and published to further the objects and purposes' of the publishers," and "all that would be needed would be a charter of incorporation." While therefore I believe that the college under the law is entitled to insist upon the admission to the mails as second class matter of "The Student at Home," I will state for your information, that all the stockholders of the corporation, are engaged either as officers, professors, teachers or workers in the promotion of this "regularly incorporated institution of learning;" and all the money re-
19 ceived by the college has been, and is employed in payment of very moderate salaries to such persons, with others so engaged, and in extending its equipment and facilities as such an institution, and in furthering the objects and purposes of such college, and the result has been the teaching of about twelve thousand students; between four and five thousand of whose names and addresses, are herewith, *with their consent,* presented to you in the accompanying catalogue. We also send you the June number of "The Student at Home" for examination.

More students are studying by the correspondence method to-day than there are in all the other colleges and universities combined. Recognizing this fact, *the University of Chicago*, under the supervis-

ion of President Harper, one of our leading educators, has now a correspondence division, which gives over two hundred and fifty different courses. This university was founded and heavily endowed by John D. Rockefeller. The international correspondence schools of Scranton, Pa., claims to, and probably does give instructions in the industrial arts and sciences to over 75,000 students each year, thus showing that instruction by correspondence is well established and very valuable as — institution of learning.

D. A. EDWARDS.

Sworn to and subscribed before me this first day of July, 1902. Witness my hand and notarial seal.

HENRY K. SIMPSON,
Notary Public, D. C."

A brief was also filed by the plaintiff, and after the same had been read, on the request of the official, an additional copy was furnished him for submission to the United States district attorney for his consideration and advice. During an additional oral argument, the Third Assistant was informed on behalf of the plaintiff, of the fact, as plaintiff is well informed and believes it to be the fact, that the letter to which the name of the assistant attorney general was attached, had been prepared while the latter was ill, and absent from the city, and was prepared by the attorney for the Postoffice Department, at the request of the Third Assistant Postmaster-General, and was not therefore entitled to the consideration claimed for it. Thereupon the Third Assistant Postmaster-General stated that he would take further time for consideration, and the publication referred to has continuously from July 31, 1899, and July 18, 1900, been admitted to the mail as second-class matter, and still continues to so pass through the mails.

But nevertheless, despite the premises, the plaintiff charges the truth to be, that it has now been advised by the Postoffice Department, through its officer in charge of the classification of mail matter, that it will revoke the permit heretofore, to wit, on the 18th day of July, 1900, granted to mail the "Student at Home" as second-class matter, and will charge upon all issues thereof mailed third-class rates. And the plaintiff showeth to the court, and charges the truth to be that unless restrained by the writ of injunction the said Postmaster General, and the said Third Assistant Postmaster-General, defendants herein, will revoke and cancel such certificate of entry and will exclude said publication from the mails as second-class matter and will enforce the payment of third-class rates on all copies mailed of said publication; notwithstanding, as the plaintiff is informed and believes, and so states the truth to be, that the said Postmaster-General, and the Third Assistant Postmaster-General, defendants herein, having determined through their predecessors, and through the *still* continuing Third Assistant Postmaster-

General, that the publication "The Student at Home" complied with all the statutory requirements, and was entitled to be transported in the mails as second-class matter at pound rates, and admitting, as they do, that there is no change either in the law under which the publication as a semi-monthly was admitted, and readmitted as a monthly, nor any change in the publication itself requiring or permitting its exclusion, said defendants and each of them in following the long line of rulings in this behalf, have exhausted any discretion, if any there was vested in them by the law, in the matter of the continued right of the said publication to be carried in the mails as second-class matter.

7. And the plaintiff further showeth to the court, that if the said defendants are permitted, as they threaten to do, and will do, to revoke the certificate of entry of said publication, the plaintiff will be without a plain, adequate, and complete remedy at law, as it will be excluded from the right to mail the publication at second-class rates, and an irreparable injury will result unless the relief sought is granted, for such exclusion will be a determination by the Postmaster General of the United States, that the plaintiff is not within
22 the meaning and intent of the act of Congress, a "regularly incorporated institution of learning" and will be discredited in its business standing, and in its capacity for reaching a large class of students, and affording them educational facilities, and it will suffer great loss thereby in its receipts, and in the means of extending its educational facilities, and in the loss of its income to cover expenses incurred by reason of the privilege granted it by the Congress and heretofore and now, by the Postoffice Department, as it will be without remedy to recover for any such loss, or for the very large expenditure of money required to circulate the paper at third-class rates, as authorized by law.

8. To the end therefore that the plaintiff may have that relief which *he* can only obtain in a court of equity, and that the said defendants may answer the premises, but not under oath or affirmation, the benefit whereof is expressly waived by the plaintiff, and that the defendants may be perpetually enjoined from revoking or cancelling the existing certificate of entry entitling the plaintiff to mail at the pound rate as second-class matter, the publication named in said certificate of entry, so long as said publication shall maintain its title as now, to such classification under existing law, *and* plaintiff asks a preliminary restraining order or injunction until the further order of the court, and plaintiff prays for such other or further relief as the nature of this case may require, and to your honor shall seem meet.

9. Therefore will your honor grant unto the plaintiff the
23 writ of subpœna, issuing out of and under the seal of this court, to be directed to said defendants, Henry C. Payne, Postmaster-General of the United States, and Edwin C. Madden, Third Assistant Postmaster-General, commanding them and each of them, by a certain day and under a certain penalty, therein in-

serted, to appear before your honor in your equity court and then and there answer the premises, and abide the order and decree of the court.

COLUMBIAN CORRESPONDENCE COLLEGE,
D. A. EDWARDS, *Pres't,*
Plaintiff.

CHARLES A. RAY,
Attorney for Plaintiff.

DISTRICT OF COLUMBIA, } ss:
City of Washington, }

Before me, Henry K. Simpson, a notary public in and for the District aforesaid, this 15th day of Sept. A. D., 1902, personally appeared Daniel A. Edwards, who being first duly sworn deposes and says, that he is the president of the corporation plaintiff named in the foregoing petition; that he has read the same, and that he knows all of the allegations therein contained to be true, except those stated upon information and belief, as to those he believes them to be true.

D. A. EDWARDS, *Pres't.*

Subscribed and sworn to before me this 15″ day of September, A. D. 1902.

[SEAL.]

HENRY K. SIMPSON,
Notary Public, D. C.

24 EXHIBIT A.

STATE OF WEST VIRGINIA:

Certificate of Incorporation.

I, Wm. M. O. Dawson, secretary of state of the State of West Virginia, do hereby certify that an agreement duly acknowledged and accompanied by the proper affidavits, has been this day delivered to me, which agreement is in the words and figures following:

The undersigned agree to become a corporation by the name of the Columbian Correspondence College, for carrying on the business of an educational institution, giving instruction in the class room, by mail or otherwise, granting such academic or honorary degrees as are usually granted by colleges and universities, publishing, copyrighting, purchasing, leasing, loaning, or hiring books to be used as text books for courses taught by the said college; publishing periodicals for the benefit of the said college; purchasing, owning or leasing, copyrights, stereotype plates and books

in process of completion of the class above enumerated, and disposing of the same, and all rights acquired by such purchases or leases; employing agents, firms or corporations to sell such books or to represent the said college in any other capacity; buying, selling, holding, leasing and renting lands, tenements, and hereditaments, erecting buildings, etc., for the purposes of the said college, and doing all other acts necessary for carrying out the objects above stated, with all rights under the laws of W. Va.

25 Which corporation shall keep its principal office or place of business at Washington, in the District of Columbia, and is to expire on the thirty-first day of December, nineteen hundred and ten. For the purpose of forming the said corporation we have subscribed the sum of sixty thousand dollars ($60,000) to the capital thereof, and have paid in on the said subscriptions the sum of sixty thousand dollars ($60,000), and desire the privilege of increasing the capital stock by the sale of additional shares from time to time to $150,000.

The capital so subscribed is divided into shares of $10 each, which are fully paid and non-assessable and are held by the undersigned respectively, as follows:

Names.	Residence.	No. of shares.
D. A. Edwards	Washington, D. C.	1,999
J. Alex Edwards	"	1,999
Thomas Edwards, Jr	"	1,999
Harry H. Lyddane	"	2
Thomas Edwards, Sr	"	1

and the capital to be hereafter sold is divided into shares of like amount.

Given under our hands this twenty-second day of July, A. D. 1899.

D. A. EDWARDS.
J. A. EDWARDS.
THOMAS EDWARDS, JR.
HARRY H. LYDDANE.
THOMAS EDWARDS, SR.

Wherefore, the corporators named in the said agreement and who have signed the same, and their successors and assigns, are

26 hereby declared to be from this date until the thirty-first day of December, nineteen hundred and ten, a corporation by the name and for the purposes set forth in said agreement.

Given under my hand and the great seal of the said State, at the city of Charleston, this twenty-fifth day of July, eighteen hundred and ninety-nine.

WM. M. O. DAWSON,
Secretary of State.

(*Testimonial.*)

OFFICE OF SECRETARY OF STATE, *To wit*:

I, Wm. M. O. Dawson, secretary of state of the State of West Virginia, hereby certify that the foregoing writing, dated the twenty-fifth day of July, eighteen hundred and ninety-nine, is a true and correct copy of the certificate of incorporation of Columbian Correspondence College a corporation created and formed under the laws of said State, as appears from the records of corporations in my said office.

Given under my hand and the great seal of the said State, at the city of Charleston, this thirtieth day of June, nineteen hundred and two.

WM. M. O. DAWSON,
Secretary of State.

27 *Rule to Show Cause.*

Filed September 26, 1902.

In the Supreme Court of the District of Columbia.

THE COLUMBIAN CORRESPONDENCE COLLEGE, a Regularly Incorporated Institution of Learning, Organized and Existing under and by Virtue of the Statutes of the State of West Virginia, Plaintiff,
vs.
HENRY C. PAYNE, Postmaster-General of the United States, and Edwin C. Madden, Third Assistant Postmaster-General, Defendants.
} No. 23533.

Upon reading the bill and exhibit in the above entitled cause, it is by the court, this 26th. day of September, 1902, ordered that each of the defendants, Henry C. Payne, Postmaster-General of the United States, and Edwin C. Madden, Third Assistant Postmaster-General, show cause before this court on the 20th day of October, 1902, why the writ of injunction should not be issued as prayed; provided, that none of said defendants herein named, shall be required to show cause as above directed, unless said defendant shall have been served with a copy of this order, and a copy of the bill herein, on or before the first day of October, 1902.

JOB BARNARD, *Justice.*

28 *Answer.*

Filed November 24, 1903.

In the Supreme Court of the District of Columbia.

THE COLUMBIAN CORRESPONDENCE COLLEGE, Plaintiff,
vs.
HENRY C. PAYNE, Postmaster-General, and Edwin C. Madden, Third Assistant Postmaster General, Defendants.
} In Equity. No. 23*352*.

Joint and several answer of the defendants to the bill of complaint and to the rule to show cause why an injunction should not be issued upon the prayers thereof.

These defendants, now and at all times hereafter saving and reserving to themselves and each of them all and all manner of benefit or advantage of exception that may be taken to the said bill for the many errors, uncertainties and imperfections thereof, for answer thereto, or to so much thereof as they are advised that it is necessary and material for them to make answer unto, answering say:

1. These defendants admit that the complainant is a corporation organized and existing under and by virtue of the laws of the State of West Virginia, and having its principal place of business at Washington, District of Columbia, where it conducts a business of giving instruction by mail. But they deny that it is a regularly incorporated institution of learning within the meaning of the act of Congress of July 16, 1894, whereby certain postal
29 privileges are conferred upon periodical publications issued by a regularly incorporated institution of learning and other bodies and institutions of like character therein enumerated.

2. The defendants admit the allegations of the second paragraph.

3. The defendants admit that on the 25th day of July, 1899, under the provisions of the general incorporation law of the State of West Virginia, the plaintiff was incorporated by a certificate of incorporation under the name of the Columbian Correspondence College. They deny, however, that it was incorporated as a "regularly incorporated institution of learning," but on the contrary aver that it is incorporated "*for carrying on the business of an educational institution,*" and for that purpose was clothed with certain powers set forth in the certificate of incorporation, a copy whereof is annexed to the bill as Exhibit "A." Defendants further deny that the complainant is either an "institution" or an institution of learning within the meaning of said act. Defendants say on the contrary that the said corporation is an ordinary joint stock company

of private character having a capital stock which is fixed by said certificate of incorporation at $60,000 (with the privilege of increasing the same from time to time to $150,000), divided into shares of $10 each, and that said shares are owned by the owners and proprietors of the said educational business of giving instruction by mail chiefly in elementary branches. They further aver
30 that the said Columbian Correspondence College is not an institution of learning within the sense and meaning of the act of July 16, 1894, but is a business enterprise of a private character, and that the same was organized, incorporated and is now conducted for profit and gain and the personal pecuniary benefit of the owners or stockholders thereof.

They respectfully submit that the remaining allegations of the said paragraph, not hereinbefore admitted or denied, relating to the number of students, names of the instructors, and the methods of instruction, are irrelevant and immaterial and matters as to which these defendants are not bound to answer.

4. It is true that, not only by the ruling of the Post Office Department (as stated in the bill of complaint), but also by the act of March 3, 1879, sec. 14, 20 Stats., 359, periodical publications issued from a known place of publication, at stated intervals, as frequently as four times a year, by a regularly incorporated institution of learning, were not admissible to the mails as second class matter, unless they, in like manner with all other periodical publications embraced in said act, had a legitimate list of subscribers. It is also true that on October 14, 1893, a bill was introduced in the House of Representatives providing—

"That from and after the passage of this act all periodical publications issued from a known place of publication, at stated intervals, and as frequently as four times a year, by or under the auspices of a regularly incorporated benevolent or fraternal society or
31 order, or a regularly incorporated institution of learning, shall be admitted to the mails as second-class matter, and the postage thereon shall be the same as on other second class matter and no more; provided however, that such matter shall be originated and published to further the objects and purposes of such society, order or institution of learning, and shall be formed of printed paper sheets without board, cloth, leather or other substantial binding such as distinguish printed books for preservation from periodical publications."

But the defendants say that the said bill as introduced was not enacted into law.

It is true that in reply to the request of the chairman of the Committee on Postoffices and Post-roads, the then Postmaster General for the time being addressed the letter mentioned in the bill of complaint, wherein he set forth not only the administrative objections quoted in the bill of complaint but a number of others, as will more fully appear by a copy of said letter annexed hereto as "Exhibit 1."

But the defendants submit that the allegations, both as to the said bill then pending in Congress and as to the answer of the Postmaster General to such inquiry, are wholly irrelevant and immaterial, and the inferences sought to be drawn therefrom and the said bill are mere matters of law, as to which this defendant is not called upon to answer.

With respect to the allegations of the said paragraph concerning the debates upon said bill in the House of Representatives, the
32 defendants likewise submit that they are irrelevant, and immaterial, and may not be resorted to for the purpose of controlling the plain language of the law as afterwards enacted by the Senate and House of Representatives of the United States, in Congress assembled.

The defendants deny that the said bill as set forth in the bill of complaint was subsequently passed by the Senate and received the approval of the President and became a law on July 16, 1894. On the contrary, they aver that the said law of July 16, 1894, as the same now stands upon the statute books, differs in divers particulars from the said bill, as will more fully appear by a comparison of said law of July 16, 1894, and the bill as hereinbefore set out. And the defendants further submit, as a matter of law, that the said act of July 16, 1894, is in no sense declaratory of the act of March 3, 1879, but is an independent act, the effect whereof is to admit to the mails as second-class matter periodical publications issued by certain classes of organizations and institutions, which publications but for said act would not be so admissible by reason of their not having a legitimate list of subscribers, as required by the act of March 3, 1879.

It is true that upon the passage of the act of July 16, 1894, divers publications issued by various organizations and institutions, considered by the Postmaster General for the time being as within the scope and terms of the said act, were admitted to the mails as second-class matter, and that such admission was continued during the incumbency of successive Postmasters General until the early part of the year 1901. The defendants aver, however, that the admission and transmission by one Postmaster General of mailable matter of a certain description at the second-class rate does
33 not create any obligation upon the United States or subsequent Postmasters General thereafter to admit publications of like character at the same rate.

But the defendants say and charge the truth to be that it was never expressly held or determined by any of their predecessors that any incorporated joint stock company engaged in the business of education for the personal and pecuniary profit of the owners or stockholders thereof was a regularly incorporated institution of learning within the meaning of the act of July 16, 1894. These defendants submit, however, that if such had been the fact, no such prior construction by one Postmaster General would have any force, effect or validity to limit the power of the Postmaster General for the time being to construe the act of Congress in relation to the classification

of mail matter which he is daily called upon to administer in the ordinary discharge of his duty. On the contrary, they submit that the succeeding Postmasters General have the right to reverse a construction or practice, even long continued, when convinced that it is founded upon an incorrect interpretation of the law; and they aver that the true construction of the said act of July 16, 1894, both as construed by the defendants and the Court of Appeals of the District of Columbia excludes from the class of "regularly incorporated institutions of learning joint stock companies like the complainant which conduct a teaching business for the pecuniary gain and profit of the owners or stockholders thereof.

5. The defendants admit that a semi-monthly publication entitled "The Student at Home," published by the complainant, was admitted to the mails at the rate fixed by law for second-class matter, on or about July 31, 1899, and on or about July 18, 1900, the
34 said publication having changed from a semi-monthly to a monthly was again admitted as a monthly publication to the United States mails at the said second class rate. A copy of said publication is hereto annexed as Exhibit No. 2. The defendants are unable to answer as to the expense, if any, the complainant was put to in the preparation for the publication of said "The Student at Home," and if the same is material they demand strict proof thereof. The defendants further submit that inasmuch as the transportation is a continuous administrative function, the performance of which is devolved by law upon the Postmaster General for the time being, the complainant could not and did not in law rely upon the continued enforcement by the officers of the Post Office Department of the supposed contemporaneous construction placed upon the act of July 16, 1894.

6. The defendants admit that on or about February 20, 1901, there was sent to the complainant the letter contained in the 6th. paragraph of the bill of complaint, allowing it 30 days to show cause why it should not be denied the privilege of mailing the publication "The Student at Home" at the second-class rate of postage, together with the circular containing the act of Congress and the opinion of the assistant attorney general set forth in the bill of complaint. In pursuance of such notice a hearing was had within the said 30 days, at which the complainant by its president and dean and counsel made such showing as it could why it should not be denied the privilege of mailing the publication "The Stu-
35 dent at Home" at the second class rate of postage. It is true that at such hearing the Third Assistant Postmaster General, acting for the Postmaster-General in that behalf, did not allege that there had been any change in the character of the publication. The defendants, however, say that it was not the duty of the Third Assistant Postmaster General, acting for the Postmaster General in that behalf, to confine such hearing to the question of whether or not such publication after its admission had changed its character, but on the contrary, it was his duty to examine into all the facts and circum-

stances tending to show whether at that time said publication did comply with the statutory prerequisites for such admission, and among them, the facts showing whether the publication was issued by a regularly incorporated institution of learning within the meaning of said act. With respect to the allegation as to the supposed change of construction placed by the Post Office Department upon the act of July 16, 1894, the defendants crave leave to refer to the concluding section of the paragraph of this answer in response to the 4th paragraph of the complainant's bill.

It is likewise true that the decision in the matter was postponed subject to further consideration and the admission of the publication to the second class rate continued for the time being and pending such consideration. Meanwhile a petition for a writ of mandamus was brought in the supreme court of the District of Columbia against these defendants by the Chicago Business College praying that they might be required to receive the publication issued by such business college as one issued by a regularly incorporated institution, which said petition, as
36 these defendants are advised and believe, was grounded on similar facts and involved the same contentions now made on behalf of complainant. But the said petition was denied by the said supreme court in April, 1902, and the construction placed upon said act of July 16, 1894, by the defendants agreed to and concurred in by the said court. Whereupon on or about June 19, 1902, the letter bearing that date and set forth by the complainant in its said bill was sent to it by the postmaster at Washington under the direction of these defendants, by which said letter the complainant was again notified that it would be given a hearing on July 2, 1902, to show cause why the publication aforesaid should not be denied admission to the mails as second class matter on the ground that it is not issued by a regularly incorporated institution of learning within the meaning of the act of Congress of July 16 1894. It is also true that in compliance with the request made by the complainant, through Charles A. Ray, Esquire the solicitor in the present cause, the time set for the hearing to show cause why the publication "The Student at Home" should not be denied transmission in the mails as second class matter under the act of July 16, 1894, was changed from July 2, 1902, at 10 a. m., to July 9, 1902, at the same hour. It is also true that, complying with such notice, the complainant appeared by its officers and counsel at the time fixed in the notice, before the Third Assistant Postmaster General, and submitted its charter for inspection, copies of the publication and the affidavit by the president of "The Columbian Correspondence College," which is set out in full in the complainant's bill. It is also
37 true that an elaborate brief was filed on behalf of the complainant and that after the same had been read an additional copy was furnished the said Third Assistant Postmaster General, as alleged in said bill. It is also true that at said hearing an additional oral argument was made in answer to the notice to show

cause why the said publication should not be denied transmission in the mails as second class matter. While it is true, as stated in said bill, that the letter therein mentioned, signed by the Assistant Attorney General for the Post Office Department, was an opinion furnished at the request of the Third Assistant Postmaster General in due course of administration, yet the defendants nevertheless deny the irrelevant, immaterial and scandalous intimation in said bill that the said letter did not contain the opinion of the assistant attorney general, or that the same was dictated or controlled by the Third Assistant Postmaster General, if it be the intention or object of the complainant so to intimate. The defendants further admit that at the conclusion of said hearing the Third Assistant Postmaster General, acting for the Postmaster General in that behalf, stated that he would take further time for the consideration of the facts and arguments so presented; meanwhile the admission of the said publication was for the time being continued as before. Meanwhile the cause in the Chicago Business College against these defendants, wherein was involved the construction of the said act of July 16, 1894, as aforesaid, was by said business college appealed to the Court of Appeals.

38 It is true, as stated in the said bill, that after the hearing of the arguments aforesaid the Third Assistant Postmaster General, acting for the Postmaster General in that behalf, became and was of the opinion that the said publication "The Student at Home" was not entitled to transmission as second class matter under the act of July 16, 1894; that, by reason of the fact that the Columbian Correspondence College was a joint stock company conducted for private gain and profit and the pecuniary advantages of the owners or stockholders thereof, the same was not a regularly incorporated institution of learning within the intent and meaning of the said act. And it is likewise true that by reason of such determination it became and was the duty of the said Third Assistant Postmaster General, acting for the Postmaster General in that behalf, within such reasonable time as the exigencies of the public service should require and deference to the courts should dictate, to exclude said publication from the second-class rates of postage and to charge on all copies thereof offered for transmission in the mails of the United States the third-class rate of postage to which such copies, according to the determination and decision aforesaid, were lawfully subject. And the defendants aver that, in pursuance of the duty aforesaid, although no formal decision had been promulgated to that effect, it became and was the intention of the said Third Assistant Postmaster General, acting for the Postmaster General in that behalf, so to exclude such publication from such second-class rate at the time when the complainant's bill praying a writ of injunction against so doing was filed against them, the said Postmaster General and

39 the said Third Assistant Postmaster General, in this honorable court. And the defendants aver that the said petition of the Chicago Business College, was upon appeal to the Court of

Appeals, again denied, and the construction of the said act of July 16, 1894, placed upon it by the defendants, again agreed to and concurred in by the Court of Appeals.

With respect to the remaining allegations of the said paragraph, the defendants submit that they are conclusions of law, as to which these defendants are not required to make answer. But the defendants submit that the admission and transmission of mailable matter at the rates and under the terms prescribed by the statutes of the United States is a continuing administrative act and duty, the performance of which is devolved by law upon the Postmaster General for the time being, and the defendants Henry C. Payne, as Postmaster General for the time being, in the performance of this duty, is in no wise bound or controlled by the action of his predecessors, nor does the admission and transmission by one Postmaster General of copies of a publication issued by the complainant at the second or any other particular rate constitute any obligation, contractual or otherwise, upon the United States or its officers thereafter to admit other copies of the said publication issued by the complainant to transportation at such rate. They further submit that whether a corporation, joint stock company or institution claiming the privileges of the act of July 16, 1894, for a publication issued by it is in fact a regularly incorporated institution of learning within the meaning of said act is a matter solely within the competence and jurisdiction of the Postmaster General for the time being, the determination of which is exclusively committed to the judgment and discretion of such officer.

7. In answer to the 7th paragraph the defendants say that in the judgment and discretion of them as Postmaster General and Third Assistant Postmaster General, respectively, said publication does not possess the characteristics of second class matter under the laws in such case made and provided; that in their judgment and discretion the complainant, The Columbian Correspondence College, is not, within the intent and meaning of the act of July 16, 1894, aforesaid, a regularly incorporated institution of learning, but, on the contrary, is a private joint stock enterprise, engaged in teaching as a business, organized and conducted not for the benefit of the public as an institution of learning but for the personal benefit of the owners and stockholders thereof. And they further say that they have, in their official capacity so found and determined. They further submit that, in contemplation of law, the only effect of their official action in so determining complainant not to be an institution of learning within the meaning of said act is confined to their official action in charging upon such copies of the complainant's publication as may be offered for transmission in the mails the lawful rate of postage to which such copies are subject. With respect to the remote and other consequences of such determination, as stated or suggested in the bill of complaint, they are unable to answer, but if the same are relevant and material (which they are ad-

vised and believe not to be the case), they demand strict proof thereof.

41 8. Answering generally to the whole bill, the defendant Henry C. Payne, Postmaster General, says that as Postmaster General of the United States he is charged by law with the duty of superintending generally the business of the Post Office Department and of executing all laws relative to the postal service; that among such duties is that of classifying the mail matter offered for transmission through the United States mails and distributing the same into the respective classes created and designated by Congress, in the course of which classification it becomes incumbent upon him, acting through his lawful subordinate, the Third Assistant Postmaster General in that behalf, to investigate and ascertain whether matter offered for transmission as second class matter does or does not comply with the conditions upon which the law permits publications to be transmitted and whether such matter is in fact second class matter or matter of some other class; that such investigation and determination exercised by the Postmaster General for the time being as the head of an executive department in the ordinary discharge of his duties requires an inquiry into facts, an examination of evidence and an application of the law to the facts; that in the case of the publication "The Student at Home," issued by the complainant, after an inquiry into the facts relevant and material, an examination of evidence and an interpretation of the law and application thereof to the facts, he, acting through the Third Assistant Postmaster General, in that behalf, upon a full, fair and impartial hearing, accorded upon due notice to the complainant, found and determined that said publication had not the statutory characteristics of second class mail matter but, on the

42 contrary, the characteristics of the third class of mail matter, by reason of the fact that the same was not published by a regularly incorporated institution of learning within the meaning of the act of July 16, 1894. Wherefore, acting through the Third Assistant Postmaster General, in that behalf, he held and determined that said publication "The Student at Home" was not entitled to admission to the mails as second class matter, and that the certificate permitting such admission should, for that reason, be revoked and become inoperative in the future, and that he, as said Postmaster General, would, in the performance of his said duty, charge upon the said publication the third class rate of postage, which said finding, determination and decision involved the exercise of judgment and discretion on the part of the Postmaster General and of the Third Assistant Postmaster General acting in that behalf, and for that reason, as these defendants respectfully submit are not subject to be reviewed by this honorable court.

In conclusion the defendants respectfully submit that the complainant in and by its said bill has not made or stated such a case as would entitle it to the relief thereby prayed, and that whether the said publication of the complainant is mailable matter of the sec-

ond-class, and whether the complainant in respect of the classification of such publication is a regularly incorporated institution of learning within the meaning of the act of July 16, 1894, as prayed in said bill to be determined, are matters wholly within the competence and jurisdiction of the Postmaster General, the determination of which is committed exclusively to his judgment and dis-
43 cretion.

The defendants further respectfully submit that as to so much of said bill as prays an injunction against the enforcement by this defendant of his decision that said publication is not entitled to transmission at the second class rate, it is against the course and practice and not within the jurisdiction of this court to interfere with, review, or afford relief against the decision and action of the head of an executive department in a matter involving the exercise of his judgment and discretion; and they further submit that it is against the course and practice and not within the jurisdiction of a court of equity to require the Postmaster General as an executive officer to perform a supposed duty in the admission of mailable matter by an injunction forbidding him to refuse to perform said duty, in which respect the defendants submit the complainant, if it be entitled to any relief, has a plain, adequate and complete remedy at law.

The defendants hope they may have the same benefit of these defences as if they had formally demurred to the said bill upon the ground thereof. Having fully answered, the defendants pray to be hence dismissed with their reasonable costs.

H. C. PAYNE,
Postmaster-General.
EDWIN C. MADDEN,
Third Assistant Postmaster-General.

HENRY H. GLASSIE,
Solicitor for the Defendants.

44 DISTRICT OF COLUMBIA, *ss:*

Henry C. Payne and Edwin C. Madden, being first duly sworn, deposes, each for himself and not for the other, and says that he has read the foregoing answer by him subscribed and knows the contents thereof, and the same are true, save those matters stated upon information and belief, which he believes to be true.

HENRY C. PAYNE,
Postmaster General.
EDWIN C. MADDEN,
Third Assistant Postmaster General.

Subscribed and sworn to before me this 11th. day of November, 1903.

[SEAL.]

THOS. E. ROACH,
Notary Public.

45 *Final Decree.*

Filed July 1, 1904.

In the Supreme Court of the District of Columbia.

THE COLUMBIA CORRESPONDENCE COLLEGE, a Corporation,
vs.
HENRY C. PAYNE, Postmaster General. } In Equity. No. 23533.

This cause came on to be heard upon the bill and answer, and was duly argued by counsel: Upon consideration whereof, it is, this 1st day of July, 1904, by the court, adjudged, ordered and decreed, that the prayer- of the complainant's bill for a restraining order and for a perpetual injunction be, and the same are, hereby denied; that the rule to show cause why an injunction should not be granted, be, and the same is hereby discharged, and that the complainant's bill be, and the same is hereby dismissed, with costs to the defendant, to be taxed by the clerk.

THOS. H. ANDERSON, *Justice.*

The complainant in open court, notes an appeal to the Court of Appeals, and prays that the bond on appeal be fixed at $100.00 which is accordingly done.

THOS. H. ANDERSON,
Associate Justice.

46 *Memorandum.*

July 12, 1904.—Appeal bond filed.

Order for Transcript.

Filed July 12, 1904.

In the Supreme Court of the District of Columbia.

COLUMBIAN CORRESPONDENCE COLLEGE
vs.
HENRY C. PAYNE, Postmaster-General, ET AL. } Equity. No. 23533.

The clerk will please prepare a transcript of the record for appeal—

The complainant designates as necessary parts of said transcript the following:

1. Original bill of complaint, and Exh. A. attached thereto.
2. Answer of the defendants; omit "Exh. Def'ts' Answer No. 2."
3. Final decree.
4. Mem: of appeal bond.

CHAS. A. RAY,
A. A. BIRNEY,
Sol'rs for Compl't.

July 12, 1904.

47 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, } ss:
District of Columbia, }

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 46, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 23,533, in equity, wherein The Columbian Correspondence College, a regularly incorporated institution of learning, is complainant, and Henry C. Payne, Postmaster-General of the United States, *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 19th day of August, A. D. 1904.

J. R. YOUNG, *Clerk,*
By ALF. G. BUHRMAN, *Ass't Cl'k.*

48 In the Court of Appeals of the District of Columbia.

COLUMBIAN CORRESPONDENCE COLLEGE
vs.
HENRY C. PAYNE, Postmaster General, and EDWIN C. Madden, Third Assistant Postmaster General. } No. 1459.

It is hereby stipulated by and between the solicitors for the respective parties that reference may be made at any hearing of this case to a printed copy of the issue of the complainant's publication, "The Student at Home," mentioned as an exhibit in the defendants' answer, and that the printing of such exhibit may be dispensed with.

CHAS. A. RAY,
A. A. BIRNEY,
Solicitors for Complainant.
HENRY H. GLASSIE,
Solicitor for Defendants.

(Endorsed:) No. 1459. Columbian Correspondence Institute *vs.* Payne, *et al.* Stipulation that exhibit may be read. The clerk will please file. C. A. Ray, A. A. Birney, sol'rs for comp. Court of Appeals, District of Columbia. Filed Aug. 29, 1904. Henry W. Hodges, clerk.

Endorsed on cover: District of Columbia supreme court. No. 1459. The Columbian Correspondence College, &c., *vs.* Henry C. Payne, Postmaster General of the United States, *et al.* Court of Appeals, District of Columbia. Filed Aug. 23, 1904. Henry W. Hodges, clerk.

ADDITION TO RECORD PER STIPULATION OF COUNSEL.

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1904.

No. 1459.

THE COLUMBIAN CORRESPONDENCE COLLEGE, A REGULARLY INCORPORATED INSTITUTION OF LEARNING, ORGANIZED AND EXISTING UNDER AND BY VIRTUE OF THE STATUTES OF THE STATE OF WEST VIRGINIA, APPELLANT,

vs.

ROBERT J. WYNNE, POSTMASTER GENERAL OF THE UNITED STATES, AND EDWIN C. MADDEN, THIRD ASSISTANT POSTMASTER GENERAL.

FILED DECEMBER 6, 1904.

In the Court of Appeals of the District of Columbia.

COLUMBIA CORRESPONDENCE COLLEGE
vs.
ROBERT J. WYNNE, Postmaster-General. } No. 1459.

It is hereby stipulated by and between counsel for the respective parties that Exhibit No. 1 to the answer of the defendant, and forming part of the record designated on appeal, but omitted therefrom

by mistake of the clerk of the supreme court of the District of Columbia, may be added to such record printed by the clerk and annexed to the printed record already filed.

CHAS. A. RAY,
A. A. BIRNEY,
Counsel for Complainant.
HENRY H. GLASSIE,
Counsel for Defendant.

Filed Nov. 24, 1903.

EXHIBIT 1.

OFFICE OF THE POSTMASTER GENERAL,
WASHINGTON, D. C., *October* 31, 1903.

Hon. Jno. S. Henderson, chairman Com. on P. O. and P. R., House of Representatives, Washington, D. C.

SIR: I have the honor to acknowledge receipt of your communication of the 16th instant, transmitting copy of bill H. R. 4003—"to admit to the mails, as second-class matter, periodical publications issued by or under the auspices of regularly incorporated benevolent societies and orders and institutions of learning,"—and asking me for "such information and suggestions" as the subject may warrant.

In reply, I regret to say that this measure is one that does not commend itself to my favor. The reasons upon which my objection is founded are these:

1st. Just at this time I believe it to be unwise to make any reduction of postage rates, or any change in the classification of mail matter that would bring about either a loss of revenue or an increase of postal expenditure. The fact that the department's annual income is seven million dollars short of its expenditure affords sufficient warrant for this belief.

2d. The law and the regulations of the department regarding second-class matter are now too liberal. Many publications that ought to be paying 3d-class postage go through the mails at a cent a pound; and the list of these, owing to the precedents that have been made, and the practice growing out of them that seems too deep rooted to get rid of, is annually getting larger. I am very strongly inclined to think that the whole subject of second-class matter ought to be carefully examined, with a view, not to enlarge the scope of the law, but to curtail it. This would be in the direction of real reform: it would enlarge the postal revenue, and it would be only fair to the publishers of legitimate second-class matter, who are the proper beneficiaries of the liberal provisions of the law governing this kind of matter, and whose rights are too often invaded by what are really bogus publications.

3rd. If this bill should pass, the amount of matter that would be let into the second-class by it would, either immediately or eventually be enormous. Let us see, generally, about what its terms would induce:

First. The benevolent or fraternal societies or orders in this country amount to many thousands: Masons, Odd-Fellows, Knights of Pythias, and other secret orders; the extensive class of insurance organizations, with a fraternal or benevolent feature; probably all mutual insurance companies or societies; the many charitable societies in the great cities; the innumerable societies connected with the churches; —, and indeed, all the religious organizations of the country—could, if they chose, avail themselves of the benefaction conferred by the bill; and that they would, whenever it suited their purpose to do so, is certain. Many of these bodies, I know, do not now issue periodicals; but under the stimulus of the privilege given by the bill, many of them would do so, and all that would be needed would be a charter of incorporation, which in most of the States can be had for a trifling fee.

Second. The institutions of learning in this country amount to thousands. Looking casually over the last report of the United States Bureau of Education, I find that the colleges and universities, the schools of theology, medicine, law, and science; the technological, normal, commercial and business colleges, and other classes of schools—not of course including the public schools—aggregate over three thousand. To these should be added scientific and historical societies; medical and law societies; agricultural, art, and scientific societies; and other societies the object of which is to advance learning in all its great departments. When it is considered that any publication issued four times a year by these institutions and societies may under the terms of the bill, go through the mails at the rate of a cent a pound, the burden that would be imposed eventually upon the postal service would be enormous.

Third. Among the present safeguards provided by law against an inundation of the mails by publications claiming second-class privileges, are that they shall not be issued to advance the other interests of the publishers; that they shall have a list of subscribers; that they shall not be intended primarily for advertising purposes, or for gratuitous distribution; and these conditions have been found by experience to be in the interest of the Government as well as of legitimate publications. In the case of the publications covered by the terms of the bill under consideration, all these barriers are removed; and the strange provision is substituted, that the periodicals shall be "originated and published to further the objects and purposes" of the publishers. Thus catalogues, prospectuses, reports, calls for meetings—everything, in a word, that is of an advertising character or calculated to help the society, or order, or institution—could come in. It needs but a moment's reflection to see that, under such a provision as this, the amount of mere advertising matter—such as now pays when sent by mail eight cents a pound—that

would be mailed at a cent a pound, would be almost incalculable. In the great cities, this mass of matter would in many cases be so great that the letter-carriers could not handle it without a great increase of force.

Altogether the bill is so objectionable that I trust your committee will not hesitate to report it adversely.

Yours very respectfully,

(Signed) W. S. BISSELL,
Postmaster General.

Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, *District of Columbia*, } *ss:*

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing to be a true and correct copy of "Exhibit 1," filed November 24, 1903, with the answer of the defendants, in cause No. 23,533, in equity, wherein The Columbian Correspondence College is plaintiff, and Henry C. Payne *et al.* are defendants, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 3rd day of December, A. D. 1904.

JOHN R. YOUNG, *Clerk.*

[Endorsed:] No. 1459. The Columbian Correspondence College, appellant, *vs.* Robert J. Wynne, Postmaster General of the United States, *et al.* Addition to record per stipulation of counsel. Court of Appeals, District of Columbia. Filed Dec. 6, 1904. Henry W. Hodges, clerk.

Court of Appeals of the District of Columbia.

COLUMBIAN CORRESPONDENCE COLLEGE
v.
ROBERT J. WYNNE, POSTMASTER-GENERAL; EDWIN C. Madden, Third Assistant Postmaster-General. } No. 1459.

BRIEF FOR APPELLEES.

HENRY H. GLASSIE,
Special Assistant to the Attorney-General.

Court of Appeals of the District of Columbia.

COLUMBIAN CORRESPONDENCE COLLEGE
v.
ROBERT J. WYNNE, POSTMASTER-GENERAL; Edwin C. Madden, Third Assistant Postmaster-General. } No. 1459.

BRIEF FOR APPELLEES.

STATEMENT OF THE CASE.

This is a bill seeking, by mandatory injunction, to compel the Post-Office Department to transport, as second-class matter, a publication issued by the complainant (appellant), upon the claim that it is published by a regularly incorporated institution of learning.

The question in the case is, then, whether the appellant, the Columbian Correspondence College, is a "regularly incorporated institution of learning" within the meaning of the act of July 16, 1894. The appellant admits upon the record that it was incorporated under the general incorporation laws of West Virginia "*for carrying on the business of an educational institution*" (Rec., p. 14), and the business thus authorized is carried on in the District of Columbia.

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It is also admitted upon the record that the appellant—

> Is an ordinary joint-stock company of private character, having a capital stock which is fixed by said certificate of incorporation at $60,000 (with the privilege of increasing the same from time to time to $150,000), divided into shares of $10 each, and that said shares are owned by the owners or proprietors of the said educational business of giving instruction by mail chiefly in elementary branches. (Rec., pp. 17, 18.)

It is also admitted upon the record that it is—

> A business enterprise of a private character, and that the same was organized, incorporated, and is now conducted for private gain and for the personal pecuniary benefit of the owners or stockholders thereof. (R., p. 18.)

ARGUMENT.

Upon this state of facts it is obvious that this case is ruled and controlled by the decision of this court in *Chicago Business College* v. *Payne* (20 App., D. C., 606).

To join issue with appellant's counsel in their evident effort to treat that decision as inconclusive and lead this court to review the grounds upon which it proceeded would place counsel for the appellees in the rather absurd situation of seeming to advance arguments in support of a unanimous opinion of this court, rendered after solemn argument and mature deliberation, and universally acquiesced in for more than two years as the law of the land. Several hundred inter-

ested corporations have accepted that decision as declaring the law, and no publication falling within its scope is now being carried at the second-class rate.

Unless called upon by the court to do so, counsel would not venture to perform that superfluous task and to reargue at length the propositions already decided in that case. And it must be said, without detracting in any way from the ability and learning of counsel for the appellant, that no point is made or line of argument pursued which was not disposed of before, nor is the case presented from any aspect not already dealt with by the court.

The meaning of the statute itself, the effect of the continued executive construction, the right of the present Postmaster-General to reverse that practice, and the power of the court to review the executive action, were all fully discussed in the brief and oral argument addressed to the court on behalf of the appellant in the former case.

I.

The Chicago Business College Case is a Controlling Authority.

It is especially difficult to follow appellant's brief in its effort to show that that decision is not a conclusive authority because this court erred in determining that case upon its merits without passing first upon the question of its jurisdiction to review the particular action complained of if it had found that action to be erroneous. To our minds this is confusing a very

plain matter. The confusion arises doubtless from the failure to distinguish between jurisdiction over a given subject-matter and the jurisdiction, or rather power, to grant, upon the particular facts of the case as developed, the relief prayed.

The situation was simply this: A petition for mandamus was brought to compel the Postmaster-General to accept the relator's publication at the second-class rate, and thus to reverse his decision that it was not so entitled. Before the writ could be granted, two questions must be decided in favor of the relator. First, whether the decision was erroneous; and, secondly, whether, if erroneous, it was that kind of action which could be reviewed and set aside by this court. To assert that when the court saw plainly (as in fact it did) that the decision was not erroneous it could not say so, and refuse the writ without first proceeding to determine whether, if the decision had been erroneous, it had the power to set it aside, savors of a solemn mystification.

The jurisdiction of the court to entertain the petition for a review of the Departmental action complained of was not questioned. Its jurisdiction over the subject matter stated in the petition was complete and undeniable. The point made for the Government was simply that the court, exercising its time-honored jurisdiction in mandamus against executive officers, would see, upon the facts stated in the return, that the action, even if erroneous, was nevertheless of a sort which it was competent for the officer to make. It

did not dispute the jurisdiction of the court to issue its process to the officer and inquire into the nature of the action complained of.

It is a most astounding proposition that the court, although it had no doubt of the entire correctness of the administrative act under review, and that the complainant's case was not made out, must nevertheless proceed to discuss the moot question as to what it would have done if it had found such act erroneous.

All this has nothing whatever to do with the question involved in *Mansfield, etc., Ry. Co.* v. *Swan* (111 U. S., 379), and other cases of like kind. The point in those cases arises from the exercise of the limited and special jurisdiction of the Federal courts. There, as everybody knows, a special state of facts must affirmatively appear in order to show that the judicial power of the United States extends to the subject-matter at all, and "the presumption is at every stage of the cause that it is without their jurisdiction unless the contrary appears from the record." Such a court will not proceed to decide the case on its merits until it is determined to be one to which the judicial power of the United States extends; for unless it does so extend, the Federal court is powerless to act at all. Here there is no question as to the extent of the judicial power; the jurisdiction over person and subject is assured, and it is manifestly absurd to insist that, in the exercise of that general jurisdiction, the court may not dispose of the case upon any decisive point without also determining every point raised. See also in this connection *Grace* v. *Ins. Co.* (109 U. S., 279).

There the court, although it was strictly without jurisdiction as the record stood, passed upon all questions in the case affecting the merits, because "it thought it convenient and proper to do so," with a view to a new trial upon amended pleading.

II.

The Prior Admission does not Estop the Present Postmaster-General.

We may, in like manner, brush aside the second main proposition of appellant that the Postmaster-General is bound by the judgment of his predecessor in admitting a periodical and that he has no legal right to vacate the former action. The contrary was distinctly ruled, both by this court and the Supreme Court of the United States, in *Houghton* v. *Payne* (31 Wash. L. R., 178; 22 App., D. C.; 194 U. S., 88). It was argued, as well, in *Chicago Business College* v. *Payne* (20 App., D. C., 606), where the judgment of this court was, from the nature of things, a convincing repudiation of it.

III.

No Adverse Contemporaneous Executive Construction.

The chief stress of the appellant's argument is laid upon the supposed prior contemporaneous constructions of the act in question. This subject was also pressed in *Chicago Business College* v. *Payne*, as well as subsequently in *Houghton* v. *Payne*, and the law upon the subject has received an authoritative enunciation from the Supreme Court in the latter case. Before

discussing again the effect, if any, to be given to such administrative constructions, it is proper to point out that there never has been, in fact, any construction of the act of July 16, 1894, contrary to that insisted upon by the Post-Office Department and affirmed by this court.

The question here is simply whether the term "institution of learning" in that act includes corporations engaged in the business of teaching elementary and commercial branches for profit.

In the answer of the defendants, the defendants say and charge the truth to be—

> That it was never expressly held or determined by any of their predecessors that any incorporated joint-stock company engaged in the business of education, for the personal or pecuniary profit of the owners or stockholders thereof, was a "regularly incorporated institution of learning" within the meaning of the act of July 16, 1894. (R., 19.)

No issue is taken upon this averment. It is admitted upon the record and states the veritable fact.

It is true that in a number of instances, including that of the Chicago Business College and that of the present complainant, various incorporated companies presenting themselves for the benefit of this act were admitted to its privileges when, in fact, they were engaged in such dividend-earning and profit-sharing enterprises. They were admitted, as it were, upon their mere assertion to be institutions of learning, and there is nothing to show that their commercial character

was made known to the official granting such admission, and it is by no means true that anyone called upon to administer this statute ever, at any time, expressed the opinion that profit-sharing enterprises of the character here disclosed could be institutions of learning.

The appellant had, for many years, the benefit of that mistaken admission, and no one is seeking to deprive it of what it has already received. But the statute is before the court for construction, and it is a feeble argument to insist that the court must desist from exercising its own mind upon it because of the supposed opinions of persons to whose minds was never presented the question their opinions are hoped to prejudge.

In this connection we may take heed of the principle stated by the Supreme Court in the "Houghton" case, where it was said that—

> While it might well happen that, by reason of the relative unimportance of the question as originally raised, a too liberal construction might have been given to the word "periodical," we can not think that if this question had been raised for the first time after second-class matter had obtained its present proportions a like construction might be made. Some question in connection with the revocation of these certificates may properly be accorded the great expense occasioned by this interpretation and the discrimination in favor of certain publications against others, to which allusion has already been made. (194 U. S., 88.)

IV

No Adverse Legislative Construction.

Not less imaginary than the supposed executive construction is the legislative one.

As both appellant's bill of complaint and its brief are filled with a great deal of more or less confusing matter concerning the debates on this act, it may be well briefly to outline its history.

Nothing could be more unfounded than the assumption that the act of July 16, 1894, is declaratory of the act of March 3, 1879. Though, in fact, the inquiry as to whether it was declaratory or not has no bearing whatever upon its construction, and is wholly immaterial to this discussion.

As the court is aware, the act of March 3, 1879, governing the admission of publications to the second class of mail matter, required among other things, (*a*) that the periodical should be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry; and (*b*) that it should have a legitimate list of subscribers; and (*c*) that it must not be designed primarily for advertising purposes, for free circulation, or for circulation at normal rates.

In administering that law the Post-Office Department held (as upon the plain terms of the statute it was compelled to hold) that publications issued by fraternal organizations and institutions of learning must, like all other publications, possess these characteristics and comply with these requirements, and that

the gratuitous distribution of copies by order of the society not being the act of the individual subscriber could not constitute a legitimate list of subscribers. Such distribution was, in addition, an infraction of the prohibition against free circulation. An opinion laying down these principles was rendered by the Assistant Attorney-General for the Post-Office Department on October 14, 1890.

Inasmuch as the way in which the beneficent aims of such fraternal societies and institutions were carried out rendered the existence of a legitimate list of subscribers unnecessary, if not impossible, and inasmuch as the purposes and objects for which they were formed were a sufficient guarantee of the public character of their publications, although addressed to a limited audience, a bill was introduced in the House of Representatives providing that the periodicals issued by these two classes of bodies should be admitted to the second-class privileges, "Provided that such matter shall be originated and published to further the objects and purposes of such society, order, or institution of learning." (R., p. 18.)

This bill as introduced did not become a law; but later, when the regular Post-Office appropriation bill was before the House in Committee of the Whole, its provisions, with some highly important additions presently to be considered, were sought to be tacked to that one as a rider.

In order to avoid the objection that new legislation could not be incorporated as an amendment to an appropriation bill, it was held by the Chair, upon a

point of order, that the amendment was declaratory of existing law, and, therefore, entitled to be submitted upon its merits to the committee. Nothing can be plainer, from a comparison of the so-called amendment and the statute of March 3, 1879, than that this was merely a not unusual legislative fiction intended to secure the passage of what was obviously desired by a large majority. The former is in no sense declaratory of the latter. It does not purport to declare its meaning—it does not refer to it in any way. It confers the second-class mailing privilege upon publications complying with an entirely new and different set of conditions, namely, that they shall be published by orders, societies, or bodies of a certain kind, whereas no such bodies, orders, or societies were mentioned in the original act, and it furthermore makes their entry conditional upon their being published to further the objects and purposes of such society, order, or institution, whereas the equivalent condition in the original act was "the dissemination of information of a public character." It is new legislation out and out, just as it was when introduced as an original bill, and there is nothing in its phrasing which intimates that the Postmaster-General was not absolutely correct in requiring *all* periodicals to fulfill the requirements of the old act.

It is true, however, that the occasion for the passage of this act of July 16, 1894, was the obviously correct insistence by the Post-Office Department that, without exception, all periodicals must comply with the requirement of the act of March 3, 1879.

In the sense that the new law carried out the broad purposes of the old law by permitting institutions of a certain public character to dispense with lists of regular subscribers, as distinguished from their members or the persons concerned or interested in them, as well as by permitting, in view of their public character, "the furtherance of the objects and purposes of such societies" to be taken as an equivalent test to that of the "dissemination of information of a public character," in this sense, I say, the new law may perhaps be said to be amendatory and declaratory of the intent and purpose of the old one.

But how does this profit the appellant? It shows, on the contrary, that Congress regarded the members of a fraternal order or society as constituting a sort of public, and the promotion of its objects as being the equivalent of disseminating information of a public character. It shows that it regarded these societies, orders, and institutions to be so broadly beneficent in their objects and purposes and so far removed from commercial enterprises that their mere character and the requirement that their publications must further their objects and purposes would be sufficient guarantees upon which to do away with the enumerated safeguards of the old act and the pointed prohibition against publications designed primarily for advertising purposes.

Giving, then, the argument as to the amendatory nature of the act its fullest scope, it is found to support in every sense that view of the meaning of the act for

which the Government contends. It is destructive of appellant's construction. It was brought to curse us, and it has altogether blessed us.

But whether the act was amendatory or otherwise, the debates concerning it, to which we are referred, throw no light whatever upon its meaning in respect of the question whether an institution of learning can be a profit-sharing and joint stock concern, conducting business for private gain. The debate to which appellant makes allusion does not concern itself with that matter at all. In point of fact, Congress could not very well have had before it the question as to the profit-sharing, pecuniary character of such enterprises as might thereafter incorporate in the hope of obtaining the benefit of this act.

V.

Mr. Bissell's Letter not an Adverse Construction of the Act.

Of equally little support to appellant is the supposed contemporaneous construction placed by Postmaster-General Bissell upon the act before its passage.

Upon the introduction of the original bill (H. R. 4003), it was referred to the Postmaster-General for information and suggestions.

In objecting to this bill, which, as introduced, provided only for fraternal organizations, societies, and orders, and institutions of learning, the Postmaster-General objected to all of them alike, and he objected just as strenuously to the admission of publications of

fraternal organizations as he did to those of institutions of learning. In other words, he objected to the principle of the bill, and was not concerned with the details of its construction. Believing that any reduction in postal rates, or any change in the classification of mail matter that would bring about a loss in revenues, was unwise, he made a general assault upon a bill which appeared to him to threaten further to reduce those revenues and to increase postal expenditure.

What he had to say against the bill applied just as much and just as strongly to institutions whose character as public trusts is unquestioned as to those whose character might be profit-sharing. He objected to all of them. How absurd then to argue that he was aiming at profit-sharing enterprises and that Congress overruled him.

To distort his general objection to benevolent societies into a construction that insurance organizations, assuming a benevolent feature for the purposes of the act, must of necessity be entitled to admission would not be more unreasonable than this effort to distort his objection based upon the great number of institutions of learning into a construction that any teaching business assuming the institutional guise for the purpose of the act must of necessity be entitled to admission.

It is obvious that he was not considering the distinction between real institutions of learning and educational business enterprises. Nothing indicates in the least that such profit-sharing enterprises would be embraced within the class of things to which he objected—

> Colleges and universities; the schools of theology, medicine, law, and science; the technological, normal, commercial and business colleges, and other classes of schools.

On the contrary, so far as one can gather from the language there used the probable trend of his mind upon the question now under discussion, it is directly against appellant's contention, for Postmaster-General Bissell went on to say:

> To these should be added scientific and historical societies, medical and law societies, agricultural, art, and scientific societies, and other societies, *the object of which is to advance learning in all of its great departments.* (Add. to Rec., p. 3, 2 par.)

Evidently Postmaster-General Bissell read in this act an intention to further the advancement of learning in the sense conveyed by those words to the English-speaking mind for centuries.

On the other hand, if it is to be argued that Mr. Bissell's fears as to the consequences of the act resulted from a broad construction of its scope, then the action of Congress in passing the act notwithstanding his objections is far more consistent with the view that Congress did not concur in his hasty construction than in the view that, agreeing with it, it chose, nevertheless, to bring about the state of things which he deplored.

In truth its action is only consistent with the view that Congress could not agree that the act would open the door to so great a number of objects as the Postmaster-General in his casual examination had imagined.

At any rate, it is no argument whatever that Congress deliberately intended to produce the evils which such a construction might entail. The passage of the act, in short, expressed merely the intention that the things designated by the words used in it should be entitled to its privileges.

As to the precise signification of the words used, Congress went into no explanations, but left it to be gathered by the ordinary processes of interpretation.

One significant fact, however, with respect to the meaning of the act, may be gathered from its history. As originally introduced, it was confined to publications of benevolent or fraternal societies and institutions of learning. As finally passed in the form of an amendment to the appropriation bill, it provided, in addition, for publications—

> by or under the auspices of a trades union, and all publications of strictly professional, literary, historical, or scientific societies, including the bulletins issued by State boards of health.

Not only that—it struck out the provision that the publication might be "under the auspices of a regularly incorporated institution of learning," and required that it should be published by such an institution. It qualified the benevolent or fraternal society by the addition of the provision that it should be "organized under the lodge system, and having a bona fide membership of not less than one thousand persons."

All of these changes and additions make to the same end. Various as are the objects thus grouped together, they have this one characteristic in common, that they

must be organized and conducted for large public and social ends. They are all institutions of a public character, designed not for private gain, but for the public good. They are social agencies devised, not for personal profit of a half a dozen incorporators, but for the accomplishment of some ideal aim.

If any doubt whatever might have existed with respect to the meaning of the term "institution of learning," as used in the bill originally introduced, such doubt was dissolved away by the further enumeration of other public agencies in pursuance of the same common purpose. Whatever meaning the term "institution of learning" might have standing alone, that meaning was definitely and conclusively established by the fuller and larger expression of the Congressional intention to foster institutions making for the social advancement of the people.

That such is the meaning of the words is clearly brought out by the new test that such publications "shall be originated and published to further the objects and purposes of such society, order, trades union, or institution of learning."

"To further the objects and purposes." Nothing could be plainer than that Congress here had in mind societies, orders, unions, and institutions having objects and purposes of a broad, public, and permanent nature. It is absurd to suppose that by the term "objects and purposes" Congress meant the objects and purposes of business enterprises. The objects and purposes of joint stock companies are to pay dividends

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to the shareholders. Their aim is to make money, and anything which accomplishes that end meets their objects and purposes. If the societies, orders, unions, and institutions, as grouped together, can be money-making and profit-sharing orders and institutions, then the safeguard of the proviso that the publication shall be conducted to further their objects and purposes is mere rubbish. It ceases to mean anything or to operate as a check upon the abuse of the second-class privilege. If, on the other hand, these societies, orders, unions, and institutions have an ideal character—if they represent an active living principle—then the proviso that their publications must further their objects and purposes becomes of paramount importance, and, if properly applied, prevents the abuse of that rate.

All this is strongly emphasized by the consideration that in this new act of 1894, conceived in the spirit of the original act of 1879, the provision that the publication must "further the objects and purposes" of the society or institution is used as an equivalent of the requirement that it (the publication) "must be originated and published for the dissemination of information of a public character, or devoted to literature, the sciences, arts, or some special industry."

VI.

The Court being Clear and Free from Doubt as to the Meaning of the Terms, Contemporaneous Executive Construction may not be Resorted to.

But this discussion about supposed contemporaneous practical construction has no place in this case. Prac-

tical construction can only be resorted to in one situation—that is, only when the court itself, after endeavoring to get at the meaning of the statute from its terms, finds itself still in doubt. Said the Supreme Court in *Houghton* v. *Payne:*

> Contemporaneous contruction is a rule of interpretation, but it is not an absolute one. It does not preclude an inquiry by the courts as to the original correctness of such construction. The custom of the Department, however long continued by successive officers, must yield to the positive language of the statute.

And, again:

> But with the language clear and precise and with its meaning evident there is no room for construction and, consequently, no need of anything to give it aid.

The rule upon this point is a rule of reason. It is simply this: Whenever a statute is properly before the court for construction, it is the function and duty of the court to construe it. If, after exercising its own powers of mind, the court still finds itself unable to say what is the right construction, it will then seek the aid of, and give due consideration and even great weight to, a contemporaneous departmental construction, provided, of course, that such construction be consistent with the act. But in this rational process there are necessarily two stages. The first stage is the construction of the act upon its terms; the effort to get at the obvious meaning of its language. If the court is then clear in its mind as to the meaning, the process of inter-

pretation is at an end. If, after such an effort, it is compelled to say that it is in doubt as to the meaning, then, for the purpose of resolving that doubt, it may recur to contemporaneous construction as an aid. Manifestly, if the court is clear in its mind, it requires no aid, and, therefore, has no need to resort to such construction. As the Supreme Court said in the *Fairbanks case:*

> Where there was no doubt we have steadfastly declined to recognize any force in practical construction.
>
> *Fairbanks* v. *United States*, 181 U. S., 284–311.
> *United States* v. *Graham*, 110 U. S., 219–221.

Practical construction, in other words, can not be resorted to for the purpose of creating a doubt which would not otherwise exist, and then to resolve in its own favor, upon the plea of ambiguity, the very doubt which it has itself created.

> *Houghton* v. *Payne*, 184 U. S., 88.
> *Edward's Lessee* v. *Darby*, 12 Wheat., 206.
> *Swift Co.* v. *United States*, 105 U. S., 691, 694, 695.
> *United States* v. *Temple*, 105 U. S., 97, 99.

Speaking of the analogous rule that a statute exempting property from taxation must be strictly construed, and that if doubt exists the claim for exemption must be rejected, the Supreme Court recently said:

> It is not a substitute for all other rules. It does not mean that whenever a controversy is or can be raised as to the meaning, ambiguity occurs which immediately and inevitably deter-

> mines the interpretation of the statute. * * * Its proper office is to solve ambiguities, not to compel an immediate surrender to them. * * * We repeat, it is the judicial duty to ascertain if doubt exists. (*Citizens' Bank* v. *Parker*, 192 U. S., 73, 75–76.)

So here it is the judicial duty to ascertain if doubt exists, and only after ascertaining that the doubt does exist is the court at liberty even to consider the supposed contemporaneous construction.

But this court has already, upon a careful survey of the statute, determined that doubt does not exist, and that, too, with the former practical construction before its eyes.

Said this court of the act in question, where the right of the Chicago Business College was challenged upon the ground that it was a profit-sharing institution:

> But we are so clearly of the opinion that the Postmaster-General was right in his construction of the act of Congress, and that the relator is not a regularly incorporated institution of learning within the sense and meaning of the law, it is wholly unnecessary for us to consider the second question. (20 App. D. C., 606, 613.)

Again, in the same case, holding that institutions of learning included only those established for the public good and not for private gain, this court said:

> **That in this popular and ordinary sense the words "institution of learning," used in the act of Congress of July 16, 1894, is to be understood, WE THINK, ADMITS OF NO REASONABLE DOUBT. (Chicago Business College v. Payne, 20 App. D. C., 606, 613.)**

If the meaning of the words "institution of learning," as used in this act, admits of no reasonable doubt, all debate about prior contemporaneous constructions is at an end.

VII.

The Appellant is not an Institution of Learning.

This court, in its opinion in *Chicago Business College* v. *Payne*, discussed the meaning of the act of July 16, 1894, from every point of view.

We may venture to repeat, however, that no recognized criterion of statutory interpretation can be applied to the act without working out the same result.

If we apply the primary rule that the terms of a statute must be taken in their natural, obvious, and ordinary sense, we find that the term "institution of learning" has always, in the ordinary speech of the people, meant precisely what this court says it means.

If we apply the rule that a statute is to be read as a whole with a view to the general scheme and purposes contemplated by it, we find that that scheme and those purposes exclude money-making enterprises.

If we apply the rule of "*noscitur a sociis*" we find that, even if the literal import of the term were not what we have found it to be, it would have to be controlled by the context and the character of the other terms with which it is coupled.

If we apply the rule that a statute should be construed so as not to produce arbitrary, capricious, and unjust results, we find that the construction we contend for is the only one which will prevent an odious and

absurd discrimination in favor of teachers who choose to incorporate as against those who do not.

If we apply the rule that a statute should be construed so as to avoid, if possible, grave doubt as to its constitutionality, we find our construction that this act is designed to assist institutions established solely for the public good and not for private gain to be the only one which does not bring in question the power of Congress to grant privileges to people engaged in one gainful occupation over those engaged in other gainful occupations.

If we apply the rule that a meaning in which a term has been used through years of legislation will be attached to it in subsequent legislation in "*pari materia*," we find that Congress in making grants for educational purposes has never failed to use the term "institution" or "seminary of learning" in the ancient and established sense of an institution for higher instruction, conducted as a public trust.

From each of these points of view, the statute was discussed in argument and dealt with by this court in the prior case, but in this connection it may be perhaps pardonable in conclusion to refer to one or two misconceptions into which appellant's counsel appear to have fallen.

A. In endeavoring to escape the force of the argument that every single object of this statute has a noncommercial, nongainful, and public purpose, they venture to make the assertion that fraternal societies, trades unions, and strictly professional, literary, historical,

and scientific societies are not public institutions, and the equally astounding assertion that fraternal orders and societies and trades unions are avowedly conducted for the financial profit of their members.

This is either a serious mistake of fact or else a quibble on the word "public." Fraternal societies, trades unions, and strictly professional, literary, historical, and scientific societies are public institutions in the sense that they are originated and conducted to accomplish public ends without reference to private gain.

Fraternal societies organized in the manner specifically required by this act are in no sense conducted for the financial profit of their members, and all the world knows that the object of trades unions is to improve the condition of wage-earners as a social class by securing a higher standard of life, shorter hours of labor, and opportunity for improvement, better sanitary conditions, higher wages, and other things making for their welfare as an integral part of society.

To describe these organizations as conducted for the financial profit of their members is to ignore the social and economic history of the past three-quarters of a century.

B. The cases cited by appellant's counsel so far fail to support the contention that the complainant may be regarded as an institution of learning within the meaning of the act that one is driven to the inference that they were not examined by counsel with their usual care.

Taking those cited as bearing upon the meaning of the term "institution of learning," we find, upon examination, that the very first of them is an authority in our favor. In *State* v. *Fisk University* (87 Tenn., 233) the question was whether land used for farming and gardening purposes, the produce of which was used for the maintenance of the students and in connection with the running of the college, was exempt from taxation under a statute exempting property held and used for purposes purely religious, charitable, literary, and educational. The court held, in the first place, that this exemption in favor of educational purposes extended not merely to primary but to higher education as given in institutions of learning. It held, in the second place, that the land used for farming and gardening purposes, being dedicated to the maintenance of the university and the furtherance of its purposes as an institution of learning, was used for purposes purely educational, and therefore exempt.

The court did not hold that the institution in question might be entitled to the benefit of the act, although a profit sharing institution. For, it is well known that the Fisk University is not a profit-sharing institution, but one conducted as a public trust, and the court was expressly careful to say, with respect to the land under consideration:

> The agreed case fails to show that any of this property *is used for profit* or for purposes not embraced within the duties of the defendant as an institution of learning.

The next case cited by appellant fails quite as much to support their contention.

The Home and Day School was incorporated as a seminary of learning under the statute of Michigan providing for such incorporations and requiring that the trustees should apply—

> all funds and property according to their best judgment to the promotion of its objects and interests.

The question in the case was whether the schools were exempt from taxation, as being within the term "scientific institutions." In deciding this question the court held, and this was the gist of the opinion—

> That educational corporations were within the term "scientific institutions" for, otherwise, there would be no exemption for educational purposes at all.

"Unless 'scientific institutions,'" said the court, "include educational corporations, there is no statute exempting any school, unless it be those in the hands of the public authorities, and then only by implication."

It is obvious that unless the court was right in this view none of the colleges and institutions avowedly conducted as public trusts in the State of Michigan would be exempt.

It appeared in the case that the charges for tuition and revenues "were exclusively used for the maintenance of the institution," except in one single instance, where a dividend of 3 per cent had been paid to the stockholders. Upon the objection that this payment of

a dividend deprived the institution of the benefit of the exemption, the majority of the court held that the single instance of dividend paying could not be taken as annulling or destroying the character of the institution as incorporated. The reason of the majority on that point was expressed thus:

> In all of these cases the legislature by conferring the exemption to corporations have, by the incorporating act, thrown such safeguards as they deem necessary around the management of the business, so as to prevent its being abused into a mere scheme for money getting. If any corporation misuses those funds the remedy is not by the action of assessing officers who have no power to punish it by taking away its exemption, but by direct proceedings to restrain and punish any corporate abuses. If it is true that the dividend made was not lawfully made, the recipient can be made to refund it, and anyone legally at fault can be made responsible according to law. (*Home and Day School* v. *Detroit*, 76 Mich., 523, at page 525.)

In short, the court held that the single illegal use of funds would not take away the character of the complainant as an institution of learning chartered "to establish, maintain, and conduct a seminary of learning."

This case is precisely analogous to that of one recently before the Post-Office Department. An institution incorporated under the law of the District of Columbia providing for institutions of learning the funds of which are to be administered as a trust, was alleged in point of fact to be misusing those funds and

declaring dividends out of the revenues. Whatever difficulty there might have been in passing upon the right of such an institution, without first proceeding upon a quo warranto, was happily obviated by the discovery that the institution had also been chartered under the law of West Virginia as a profit-sharing "educational institution."

In the case at bar it will also be recollected that the appellant is not incorporated as an institution of learning, but under the "joint stock company" of the West Virginia law, as an *educational* institution.

The Massachusetts cases are equally against appellant's contention. In *Trustees of Wesleyan Academy* v. *Inhabitants of Wilbraham* (99 Mass., 599), the question was whether land cultivated in connection with the academy, the produce of which was used at the boarding table of the school and for similar purposes, was exempt from taxation. The court said, sustaining the exemption:

> It does not appear that any profit is made by the plaintiffs out of what is thus furnished the boarders.

Again, in stating that if the land had been leased out to other persons, the exemption would not apply, the court added:

> It would be the same if the plaintiffs carried on their farm and sold the produce at its market price for the use of students in order to make a profit as farmers and dealers in milk and vegetables. But, as it is managed, the object not being to make a profit to the funds of the insti-

> stitution, but to benefit the students, it is as really used for the purpose for which the institution was incorporated as the buildings and school apparatus. (*Trustees Wesleyan Academy* v. *Inhab. Wilbraham*, 99 Mass. App., p. 604.)

And here we may observe a fallacy of equivocation in which appellant's counsel have fallen. They affect to treat the Government's contention that institutions of learning, as well as fraternal societies, trades unions, and professional, historical, and scientific societies are public institutions, as meaning that such institutions must be controlled or supported by public authority. We make, and have made, no such contention. As was said by the supreme court of Minnesota in the *County of Humphries* v. *the Brotherhood of the Church of Gethsemane* v. *Minnesota*, 460–462.

> The word "public" has two proper meanings. A thing may be said to be public when owned by the public and also when its uses are public.

It is in the latter sense, of course, that the Government has throughout contended that the things enumerated in this statute must be public. To argue, as appellant has done in several parts of its brief, against the supposed contention that they must be owned and controlled by the public is simply to belabor a man of straw. We have always conceded that institutions of learniing, conducted by the church and by private corporations, using their funds as a trust for the maintenance of the institutions which they conduct, and not for money getting, are within both the spirit and the letter of the statute.

The cases cited from 98 N. Y. and 42 Hun. are equally incapable of the construction placed upon them by the appellant.

In *Temple Grove Seminary* v. *Cramer* the question was merely whether the seminary lost its exemption by leasing a building during the summer months. The court held that it did not, but the reason is to be found in that part of the opinion which is omitted from appellant's brief, although it immediately follows the quotation given. It was this:

> By leasing the premises during the summer the corporation is enabled to increase its income applicable to the purposes of its creation. (*Temple Grove* v. *Cramer*, 98 N. Y., 126.)

Likewise, with respect to *People ex rel Seminary of Our Lady* v. *Barber* (42 Hun., 27), the question there, like that in *State* v. *Fisk University*, was whether the exemption extended to all the land at the seat of the seminary or excluded that cultivated for the produce used at the school. The court held that the—

> farm used for the maintenance of the college goes in support of its efficiency in aid of education, and seems to be wholly devoted to the purposes of the institution and in its behalf (p. 31).

It added:

> In the view taken here this is not done as a means of profit as distinguished from that of maintenance of the institution, but as the latter, and for its support in the accomplishment of its educational purposes (p. 32).

Another illustration of an engineer hoist by his own petard is found in the *Nebraska case* cited by appellant.

The plaintiff was a medical college and the only question in the case was whether the term "school purposes" in the statute of tax exemptions should apply only to the lower grade and not to higher institutions like colleges. The court held that the term "school purposes" could not reasonably be confined only to the lower forms of education to the exclusion of the higher. It is true, as stated in appellant's brief, that the students in this institution paid for their tuition, but before citing that fact as evidence that it was a profit-sharing institution, counsel should have read (if not cited) a little further. For, the facts upon which the case was decided were—

> The fees are used for paying the expenses of the institution, the janitor, fuel, and running expenses of the college. (22 Neb., 452.)
>
> We have never paid any dividends on stock. None of the money received from students has been used to pay a dividend to stockholders. (Ibid.)

And it appeared that not only was there no profit-sharing but that the professors in this institution gave their services free. (*Omaha* v. *Medical College*, 22 Neb., 449.)

Cassiano v. *Ursuline Academy* (64 Tex., 673), also cited by appellant, is not concerned in the least with the meaning of the term "institution of learning." The question in that case was whether the provision of the Texas constitution exempting from taxation "a

building used exclusively for school purposes" was applicable to the land upon which stood an academy conducted by the Ursuline Order of Nuns. The principal point was whether the term "building" included not only the structure itself but the land on which it stood. A subsidiary point was whether the Ursuline Academy was excluded from the exemption because it was a private and not a free school. The court held that the term "building" did include the land to which such building was irremovably affixed, and that the term "school" obviously included both public and private schools. We fail to see what light is thrown by this decision upon the term "institution of learning."

In truth, all these cases concerning tax exemptions for schools have little if any bearing upon the question at bar. As already pointed out by this court, Congress has not failed—in the incorporative law of the District of Columbia, for example—to distinguish between institutions of learning and instrumentalities of elementary education, such as schools. In fact, there is a great number of statutes, extending over more than a century of legislation, in which this distinction between schools and institutions of learning has been steadfastly adhered to.

Under these statutes 1,165,520 acres of public land have been granted to States and reserved to the Territories by the Federal Government for the support of higher education. These grants are exclusive of the large grants for agricultural and mechanical colleges, and altogether separate and distinct from the still

larger grants for common schools. Beginning with the ordinance of May 20, 1785, and the powers of the Board of Treasury of July 23, 1787, for disposing of the lands in the Western territory, there were inaugurated two policies of Federal aid to education: (*a*) The reservation of one section in every township for the maintenance of public schools, and (*b*) the grant of two complete townships in every State for a seminary of learning.

This policy has been consistently pursued down to our own day, and it is mainly upon the foundation of these grants that the flourishing State universities of the West and Southwest have been maintained. A list of these acts, which are all of the same general type, will be found in the appendix. An examination of them will show that Congress has invariably used the terms "seminary of learning" and "university" as terms of similar import and in contradistinction to "schools." A reference to one or two of these acts will make this clear. The contract between the United States and the Ohio Company in 1787 stipulated that two townships "should be reserved for the support of a literary institution." In pursuance of this reservation, the legislature of the State chartered the American Western University, and vested the lands in the corporation "for the sole use, benefit, and support of the university." Ohio also received the benefit of another grant by a contract between the United States and John Cleves Sims, that "one township be set apart for a seminary of learning." (Act of March 5,

1792, ch. 30, 1. Stat. L., 266.) In pursuance of this grant, the legislature chartered Miami University, and vested the seminary township in the trustees of that institution, permitting them to use, in support of the university, only the income arising from the land. (7 Ohio Laws, 184.)

In the case of Michigan the act of Congress approved May 20, 1826 (ch. 90, 4 Stat. L., 180), is entitled "An act concerning a seminary of learning in the Territory of Michigan." What Congress understood by a "seminary of learning" appears from the body of the act, which provides that—

> there be set apart and reserved out of the public lands in the Territory of Michigan * * * a quantity of land not exceeding two entire townships for the use and support of a university within the territory aforesaid and for no other purpose whatsoever.

Precisely the same thing was done in the same terms in the case of Wisconsin. (Act June 12, 1838, ch. 110, 5 Stat. L., 244.)

The term "seminary of learning" is used steadily in this sense of an institution of general higher education in act after act until, in later years, the term "university" or "State university" begins to be substituted for it, and the thing denoted by these terms has been invariably the same.

An examination of the legislation extending Federal aid for purposes of education shows a constant and unmistakeable distinction between elementary education as given in schools and higher education as given

in institutions or seminaries of learning. It shows, as well, that the Federal Government, in lending its aid to education, has always done so upon the principle that it should be conducted as a public trust and for no other purpose whatsoever.

VIII.

The Determination by the Postmaster-General of the Question whether or not an Educational Corporation is a "Regularly Incorporated Institution of Learning" is not a mere Ministerial Act.

It is not proposed to argue at length the foregoing proposition, the decision of which is rendered unnecessary with the view taken by this court as to the correctness of the Department's action. It is intended merely to draw the court's attention to the fact that the act of the Postmaster-General in such cases will not be set aside unless the court is clearly convinced that it is not only erroneous, but one which the officer has no power to make.

> *Noble* v. *Union River Logging Co.*, 147 U. S., 165, 176, 177; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S., 316, 324.

In view of the fact that this subject has been so frequently debated at the bar of this court, counsel will content themselves with drawing the attention of the court to the decision of the Supreme Court of the United States affirming the judgment of this court in *Bates and Guild Company* v. *Payne* (194 U. S.), and the cases there cited. It is there said—

> The rule upon this subject may be summarized as follows: That where decision on questions

> of fact is committed by Congress to the judgment and discretion of the head of a Department, decision thereon is conclusive; and that even upon mixed questions of law and facts, or of law alone, his action will carry weight and strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power and will occasionally exercise the right of so doing.

In this connection it is important to point out that we are not dealing here with the case where a burden is to be laid upon something already existing, but with the case where an entity is being artificially created for the express purpose of reaping the benefit of a privilege designed for a different class of objects. The purpose for which the gentlemen conducting the Columbian Correspondence College in the city of Washington have proceeded to incorporate their concern under the laws of the State of West Virginia as an educational institution is too obvious for comment. This is not a case where a statute is placing a burden upon the citizen where any doubt as to the burden should be resolved in favor of the citizen. On the contrary, it is a case of a Government grant of a special privilege or benefit, where any doubt as to the extent of the privilege is to be resolved in favor of the Government. (*Swann and Finch Co.* v. *United States*, 190 U. S., 143, 146; *Hannibal, etc., Railroad Company* v. *Packet Company*, 125 U. S., 260, 271.)

It is respectfully submitted that the action of the Post-Office Department was correct, and that the decree of the court below refusing to set that action aside should be affirmed.

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APPENDIX.

DIRECT GRANTS IN AID OF HIGHER EDUCATION.

May 5, 1792, ch. 30, 1 Stats. L., 266.
April 21, 1792, 1 Stats. L., 257.
March 3, 1803, ch. 21, 2 Stats. L., 225.
March 26, 1804, ch. 25, 2 Stats. L., 277.
April 19, 1816, ch. 57, 3 Stats. L., 290.
February 17, 1818, ch. 12, 3 Stats. L., 406.
April 18, 1818, ch. 67, sec. 6, 3 Stats. L., 430.
April 20, 1818, ch. 126, 3 Stats. L., 466.
February 26, 1819, ch. 31, 3 Stats. L., 485.
March 2, 1819, ch. 47, 3 Stats. L., 491.
March 6, 1820, ch. 22, 3 Stats. L., 545.
March 3, 1827, ch. 97, 4 Stats. L., 244.
March 3, 1803, ch. 28, 2 Stats. L., 226.
April 21, 1806, ch. 39, sec. 2, 2 Stats. L., 394.
March 3, 1811, ch. 46, 2 Stats. L., 664.
May 20, 1826, ch. 90, 4 Stats. L., 180.
June 23, 1836, ch. 120, 5 Stats. L., 58.
June 23, 1836, ch. 121, 5 Stats. L., 59.
March 3, 1845, ch. 75, 5 Stats. L., 788.
March 3, 1845, ch. 76, 5 Stats. L., 789.
June 12, 1838, ch. 110, 5 Stats. L., 244.
August 6, 1846, ch. 89, 9 Stats. L., 58.
March 3, 1853, ch. 145, 10 Stats. L., 248.
July 17, 1854, ch. 84, 10 Stats. L., 305.
July 22, 1854, ch. 103, 10 Stats. L., 309.

December 15, 1854, ch. 6, 10 Stats. L., 598.
February 21, 1855, ch. 117, 10 Stats. L., 611.
January 29, 1861, ch. 20, 12 Stats. L., 126.
March 2, 1861, ch. 79, 12 Stats. L., 208.
March 14, 1864, ch. 31, 13 Stats. L., 28.
April 19, 1864, ch. 59, 13 Stats. L., 49.
July 4, 1866, ch. 166, sec. 2, 14 Stats. L., 85.
July 8, 1870, ch. 227, 16 Stats. L., 196.
March 3, 1875, ch. 139, 18 Stats. L., 474.

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